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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT FOR THE
UNITED STATES

October Term, 1993

Kathy Fleming, Petitioner,

v.

Borden, Inc., Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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October 21, 1993

QUESTIONS PRESENTED

1. Does 29 U.S.C. §1140 require a showing of intent or scienter as regards its prohibition against discriminating "against a participant or beneficiary for exercising any right to which he is entitled under" an ERISA plan or only as regards discriminating against a plan participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled", which is the language of the second clause of the statute?

2. Does the language prohibiting discrimination against an ERISA plan participant "for the purpose of interfering with the attainment" of rights to which a participant may become entitled require proof of an actual subsequent entitlement of the rights sought to be interfered with or can a

participant sue for damages or injuntive relief caused by another's discrimination based on a preception or possibility which failed to materialize?

3. Does an employer's policy of terminating employees who exceed the plant average of absences of two percent a month and which makes no reasonable exception for absences caused by health problems or disabling conditions inherently discriminate against participants in the employer's health and disability ERISA plan?

4. Does 29 U.S.C. §1132 provide a cause of action for injuntive relief for violations of 29 U.S.C. §1140 even after the plan participant was later terminated as a result of the prior violations?

5. Was an inability to do her regular job duties sufficient to cause the waiting period for petitioner's long term

disability to run even if respondent gave her light duty work to do and kept her on the payroll?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Kathy Fleming and the respondent Borden, Inc.

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IN THE SUPREME COURT FOR THE UNITED STATES

October Term, 1993

Kathy Fleming, Petitioner,

v.

Borden, Inc., Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner Kathy Fleming respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on June 28, 1993 with petition for rehearing denied on July 23, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Ciruit was unpublished and

is reprinted in the appendix hereto at page 1.

The memorandum decision of the United States District Court for the District of South Carolina (Anderson, D.J) has not been reported. It is printed in the appendix hereto at page 5.

JURISDICTION

This case was before the District Court for South Carolina pursuant to 29 U.S.C. §1132 and 1140, the Employment Retirement Income Security Act of 1974 (ERISA). On July 9, 1992 the District Court granted respondent's motion for summary judgment. On August 4, 1993 the District Court denied petition's request for reconsideration.

On petitioner's appeal, the Fourth Circuit on June 28, 1993, entered a judgment and opinion affirming the District Court's order.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

29 U.S.C. §1132(a)(1)(B), in relevant part, gives ERISA plan participants a civil action to recover benefits due under an ERISA plan, to enforce their rights under a plan, or to clarify their rights to future benefits under a plan. 29 U.S.C. §1140 makes it unlawful for any person to discharge, discipline, or discriminate against a participant for exercising any right to which he is entitled under the provisions of a plan, or for the purpose of interferring with the attainment of any right to which such participant may become entitled under a plan. 29 U.S.C. §1140 provides for enforcement of its provisions through 29 U.S.C. §1132.

STATEMENT OF THE CASE

Petitioner was employed by respondent as a santation worker on the third shift from January 22, 1981 until respondent terminated her for excessive absences on June 25, 1986. Petitioner contends that she was constructively terminated on or around April 17, 1986 when, after her health had continued to become progressively worse over the last four years, respondent both refused to put her on disabled status and gave her work to do which was intolerable considering her physical condition. She brought suit under various state law causes of action and, after the respondent removed the case to federal court, petitioner added the ERISA cause of action which is at issue herein.

Petitioner alleged that respondent (1) wrongfully cut off her short term

disability payments in October 1985 and forced her back to work while she was still disabled which constituted discrimination against her based on her exercising her ERISA plan rights and thereby interfered with her attainment of her plan rights (2) used her absences caused by her disabling condition to discipline and ultimately discharge her for exercising her rights under the plan and thereby interferred with her attainment of rights under the plan (3) refused to give her light duty work, as its policies called for after a job related injury, but instead required her to continue her regular job duties contrary to its own plant physicians' orders (4) terminated her as she was about to qualify for long term total disability benefits when she refused to return to her regular job duties against

the physicians' instructions (5) used unannounced and undocumented policies as its justification for terminating petitioner.

The decision of the Fourth Circuit gave two reasons for the dismissal of petitioner's case on summary judgment, holding that petitioner (1) failed to establish her disabilty through medical opinions during the relevant time period and (2) failed to provide any evidence of a causal link between her discharge and her membership in respondent's benefits plan. There were a number of factual and legal issues which the courts below had to decide in order to arrive at these ultimate conclusions. Taking these in their logical order, petitioner will attempt to show why the courts below must have erred in their analysis of these

issues so as to have arrived at the wrong result.

1. FACTUAL BACKGROUND

Respondent alleges that petitioner was fired for excessive absenteeism, stating in the affidavit of its plant personnel manager, Bob Owens, which was signed June 1, 1992 and submitted in support of Borden's motion for summary judgment heard June 12, 1992:

> We consider <u>any absenteeism above the plant average to be excessive</u>. At the time we were dealing with Kathy Fleming's attendance problems, the plant average was between 1.5 and 2 percent....She was on two medical leaves of absence in 1985, one for an operation on her thumb, and the other for migraine headaches. These were not counted against her attendance record. We will hold an employee's job for up to six months of medical leave. <u>Absences for short term illnesses are counted towards excessive absenteeism, even if a doctor's excuse is provided</u>." (App. 340-41, emphasis added)

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When specifically deposed on the issue on March 27, 1990, and asked the question, "The employee can't say 'I was on medical leave of absence' can they? I mean that has to be approved, doesn't it?", Mr. Owens answered, "What we've said is medical leave of absence is a doctor saying that they should not work ... And we would grant, based on the doctor's statement, medical leave of absence" (App 547 L.2; also see, 500 L.14-17, 495 L.7-23, 512 L.1-3).

(a) MIGRAINE RELATED DISABILITIES

Any and all of petitioner's absences in 1985 were covered by the two warnings which she received that year and were related to the medical leaves of absence to which Mr. Owens refers. The warning, dated June 29, 1985 states:

> Since 1 January 1985 Kathy has been absent a total of 68 days due to personal medical problems. Fifty of these days

were medical leave of absence. Eighteen days have been without medical leave although a doctors excuse has been presented each time ..." (App. 349, emphasis added).

It is clear that respondent did not grant petitioner medical leave for the eighteen absences, but instead counted the absences against her despite the fact that petitioner provided respondent with doctor's statements in accordance with respondent's announanced policies. Furthermore, it is clear that respondent knew that these eighteen absences were not caused by petitioner's neglect of her responsibilities or even the occasional sick day, but were part of petitioner's disability with migraines, dizziness, blurred vision, etc. for which respondent paid petitioner disability payments from July 9, 1985 through November 15, 1985. The proof of respondent's knowledge is found in the warning given petitioner in

December 1985, which states "On June 29, 1985 Kathy was given a warning [the first of those at issue in this case] on excessive absences. At this [sic] time she was given a medical leave to get her health problems corrected" (App. 350, 351). Thus, respondent admits that at the same time that it gave petitioner the warning in June about her absences it advised her to apply for disability, (App.773 L.9-776 L.10) thereby counting absences, which its personnel manager knew were caused by petitioner's disability, toward petitioner's discipline and eventual termination.

Respondent's short-term disability plan pays benefits "from the eighth day of disability or the first day you are under a physician's care if this is later." (App. 380). Eight absences out of a 250 day work year gives an average

absentee rate of 3.2 percent, well in excess of the percentage rate respondent used to terminate employees. While the small amount of money for disability benefits for the absences covered by the June warning is not significant, the fact that these absences were counted against petitioner is significant, especially as it becomes clear that respondent repeats this pattern repeats up through April 1986 when it constructively terminated petitioner as discussed below.

Petitioner's neurologist's notes for August 14 and September 17, 1985 described petitioner's disability as follows:

> Her headaches were, essentially, stereotyped .... When the headache is severe, she will have blurring of her vision and on occasion has had her vision dimmed to the point where it was difficult for her to see. She will have nausea, but does not actually vomit with the headache. The headache

> occurs 3 or 4 times a week and may last 1 - 2 days (App 157-58).
>
> * * * *
>
> 4 days ago she began to have, daily, more severe headaches with nausea and blurred vision. IMPRESSION: migraine, inadequately controlled .... (App.160)

Respondent's Benefits Claims Department's notes reveal that it later unilaterally cut off petitioner's disability payments (1) after it received an unsubstantiated rumor, with which petitioner was never confronted, that "10-18 per Bob [Owens] people said they have seen Ms. Fleming showing houses (her father is a realtor)" and (2) after it was unable to find another neurologist to do an independant medical examination on petitioner (App.162-5). The denouement came on October 31, 1985 when respondent's notes reveal, "10-31 Ee [employee] called about a check .... She

said she may have to take legal action. I told her to do what she had to do, but I wouldn't pay benefits until we review report of IME doctor" (App 165). The impasse was resolved by Mr. Owens telephoning petitioner and convincing her to come back to work by telling her that her job status would be threatened if she did not, apparently referring to respondent's policy of only holding a job for someone on disability for six months (App.931 L.14).

Respondent and petitioner knew that at the time of petitioner's return that her neurologist had noted that the migraines were still "inadequately controlled" (App.160) and that respondent's ERISA Plan provided that, "If the same or related disability reoccurs within 90 days after you have returned to work, Short-term Disability

benefits will be paid as if the disability had been continuous" (App. 381). Nevertheless, when petitioner missed two days and had to leave early two days right before the Christmas holidays due to the same migraine related symptoms, rather than give petitioner disability pay, respondent gave her the warning quoted above, sent by certified letter dated December 27, 1985 (App.351). On December 30, 1985, within one or two days of receiving this letter, petitioner was seen by the opthomologist who had treated her for an eye injury incurred at work in July 1984, a few months before the time appellant reported that her problems with migraines had begun (App.145-9, 157). The opthomologist described petitioner's symptoms as "LE [left eye] vision is blurry, swells and is red" and he scheduled her for a CT

scan. After getting the CT scan back and seeing petitioner on January 17, 1986, the opthomologist gave a dignosis of "pain, decreased vision, double vision left eye" and referred petitioner back to the neurologist who was treating her migraines (App 173-5).

The consultations between the opthomologist, Dr. Nicholson, and the neurologist, Dr. Nichols, as well as the similarity of the symptoms they describe, indicate that petitioner's absences in December 1985 should have been considered under the provision of respondent's benefits plan which provided that when, "the same or a related disability reoccurs within ninety days after you returned to work, Short-term Disability will be paid as if the disability had been continuous" (App. 381). Again respondent knew that it was disciplining

appellant for absences caused by her disabling condition. This is shown by the fact that Mr. Owens, upon having the opthomologist's bill submitted as a workers' compensation claim, wrote respondent's carrier:

> This employee states that Dr. Nicholson [the opthomologist] sent her for this CT scan for the alleged injury that happened 19 months ago. This employee has had extensive medical history recently concerning headaches which has been covered under her group health (App 199).

Petitioner provided doctor's excuses from her neurologist for four more abences caused by migraines on February 26, March 16, and April 29 and 30, 1986 (App.215, 256). Petitioner's supervisor's notes for the period March 8 to April 30, 1986 show respondent calculating "7.9% [abences due to] headaches" for that time (App. 258).

Counting the eighteen days petitioner was out with this disability in the Spring of 1985, the one hundred and thirty-two days petitioner was out on short-term disability during the Summer and Fall of 1985, the four days she missed in December 1985, and the four days petitioner was out due to her migraines in 1986, the total comes to one hundred and fifty-eight (158) days of cumulative disability for the same problem within a twelve month period, with recurrances always being within ninety days of one another.

Respondent's benefits plans provide for short term benefits to end after one hundred and eighty-nine days of disability in a one year period, stating:

> If a disability lasts longer than 27 weeks, LTD [Long-term Benefit] Plan benefits can provide monthly income beginning the 28th week and continuing for as long as you

> remain totally and continuously disabled. Both occupational and non-occupational disablities are covered by the LTD plan." (App 389, emphasis added).

(b) ARM RELATED DISABILITIES

On January 30, 1986, petitioner was climbing on a packaging machine in order to clean it and fell. She caught her full weight with her right hand, the same hand on which she had had the ligament replacement surgery which had caused her to take the medical leave of absence in early 1985 to which Mr. Owens' affidavit quoted above refers. Petitioner worked on the sanitation crew from eleven at night until seven in the morning. After trying to continue to work, she eventually went to a hospital emergency room at around 4:00 A.M. January 31, 1986, where the plant doctor put her arm in a splint and sling and directed that petitioner be given light duty work and not use her

right arm (App.184-90). Other than a couple of limited attempts by petitioner to use her injured arm while at work, which only caused her injury to get worse, the plant doctors never changed their instructions that petitioner was not to use her right arm.

Petitioner's condition, however, got continually worse. Petitioner had returned to work the day after the injury, but on February 9, 1986 she had to leave work to go to the emergency room due to continuing problems with her arm. The plant physician took her out of work until February 12, 1985 (App.190, 194). On February 17, 1986, the plant physician's notes indicate ,"fiberglass cast placed" (App.190). On February 19, 1986, the same day that Mr. Owens wrote respondent's workers' compensation carrier asking it to disallow the claim

for petitioner's opthomologist's bill, Mr. Owens wrote petitioner's supervisor John Rogers:

> 2-19-86 - John Rogers: I talked to Dr. Tesseneer [one of the plant's designated workers compensation physician] today and he is the one who put the cast on Kathy. He is treating her for Tendinitis and expects at this point to keep the cast on for a couple of weeks .... Based on 3 days absent for flu--one on Sunday to see doctor about the arm, one day after being scheduled to see doctor for arm, this leaves 1 day and a partial plus 1 late to work with. Let's hold off on the write-up at this point. But let's review each absence.

To which absence Mr. Owens refers as being left unexplained, it is hard to decipher. Based on the warning which respondent gave petitioner on March 12, 1986, the third warning which respondent relies on as justification for terminating petitioner, and by looking at petitioner's attendance chart (App. 354, 347), one can infer that the one absence

to which Mr. Owens apparently refers is January 17, 1986, when petitioner saw her opthomologist for her migraine related symptoms and for which she provided a doctor's excuse (App.174, 176). The one day late, January 23, 1986, is admittedly the only day petitioner had been late in her five years at Borden (App.544 L.12-549 L.7, 1129 L.15-1130 L.16). Her only partial workdays were when she left work to go to the emergency room.

Petitioner provided a doctor's excuse for being out from February 13 to 15, 1986, the flu days Mr. Owens' memorandum mentions, and Mr. Owens concedes in deposition that someone in a food processing plant should not work if she has an infectious disease (App.198, 526 L.11-529 L.17, 540 L.14). Petitioner was absent the night of February 21-22, 1986 and the plant physician's notes show

that, when he saw her the morning of February 22, 1986, she was suffering "hypothenar muscle cramping" in her injured hand (App. 190). This was also the time respondent began to keep notes on petitioner, the first of which simply noted "2-21 swollen thumb" (App 203), showing that respondent knew that this absence was related to petitioner's injured arm. The next supervisor's note says, "3-5 Dr. had removed half of [the fiberglass] cast [which had extended to her biceps]. The other half was loose on her arm. Was to see Dr. on 3-6 at 8:45 to have new case put on." (App 203). The physician's notes confirm this as the reason for petitioner's absence on March 5, 1986 (App. 202). Respondent's next note reads "3-6/7 at 1:30 A.M. [petitioner] said she had stomach ache and was throwing up and had to go home"

(App. 203). Petitioner provided a doctor's excuse for being out March 6-8, 1986 with, what was then believed to be, another infectious disease (App 208). A later note from a "clin. pharmacist", however, states petitioner's medications for her arm injury could cause drowziness and "stomach distress" (App.221).

2. RESPONDENT'S POLICIES

Except for one day late and three days out with flu and three days out with stomach problems, every absence which respondent counts against petitioner from January 1,1985 up to the third warning for absences which respondent gave petitioner on March 12, 1986 was connected to petitioner's migraines or arm injury as shown either by a physician's excuse or a physician's office notes, such that respondent could easily have obtained a more detailed

explanation of the absence from a physician had it desired or requested such. Despite this, on March 12, 1986 respondent sent petitioner a certified letter which listed some of the absences discussed above and told her "When queried about the reasons for your consistant [sic] lateness and absenteeism, you were unable to offer any reasonable excuse which would be accepted" (App. 209). This obviously contradictes the medical leave policy which Mr. Owens described in his deposition as set out herein above. This also contradictes the handbook given petitioner at the time she was hired. The handbook sets out respondent's specific policies regarding attendance as follows:

> ATTENDANCE - An UNEXCUSED ABSENCE occurs when an employee fails to notify their supervisor of absence prior to scheduled shift starting time and/or permission is not

> granted by the supervisor. Disciplinary procedures for unexcused absences are as follows: One occurrance is considered equal to one day of absence and will require a written reprimand. Four reprimands for unexcused absence within a 12 month period will be cause for termination (App.138)

Absences which were unexcused under the handbook policy were marked on petitioner's attendance chart as an "L" (App.348). She had none prior to April 17, 1986. Petitioner's supervisor's admitted that she always came to them and obtained permission to leave early, as the handbook required, when she would leave because her arm was hurting her. Petitioner nevertheless received a reprimand, dated June 12, 1986, for unexcused absences. As discussed below, however, this was after respondent had constructively terminated petitioner. Respondent contends, however, that it did

not terminate petitioner pursuant to the handbook policy, but that it terminated petitioner pursuant to a sentence found in a Plant Rules Book which it admits it casually handed to employees a year and a half after petitioner was hired and received the handbook which she stated she had read and studied at the time. The sentence relied upon by respondent reads, "Excessive absences for any reason are subject to termination" (App.359), which makes no grammatical sense as it literally means that "absences will be terminated". Respondent admits that it made no effort to bring this significant change in policy to its employee's attention, despite having contracted with them in its handbook that "your supervisor will regularly keep you up to date on important matters" and "As your representative, he or she has the

responsibility to keep you informed of company matters that are of interest to you" (App.135, 126). There is no evidence that the Plant Rules Book policies on attendance were brought to petitioner's attention or were ever cited as the authority for the warnings that respondent was giving petitioner. The alleged details of the policy, such as the alleged "plant average absences" rule to which Mr. Owens refers in his affidavit, petitioner's supervisors admit were never announced to employees or documented in any way. Also, as respondent must admit, this was never revealed in discovery in the case despite petitioner's having asked questions directly on the point (App.556 L.1-10, 63-72). The plant manager deposed that he and the personnel manager would just look at each individual absence and decide how

to treat it, but the two also deposed to a number of supposed unannounced and undocumented exceptions whereby absences for such things as military duty or jury duty were not counted towards excessive absences (App. 919 L.1-922 L17, 1066 L.10-17).

3. CONSTRUCTIVE TERMINATION

In April, respondent's notes show it insisting that petitioner (1) clean the conveyors high above the plant floor, (App 831 L 24 -833 L 8,227-9,566 L 1-569 L 17,579 L 8-581 L 10,800-801 L 17, 1039 L 5,1113 L 20-1119 L 10,1178 L 10,1255 L 25) (2) scrape the goo-like, cooked-on oil off the oil-holding tanks, (App 593 L 8- 594 L 17,1110 L 20-1113 L 22,1163 L 12-1170 L 12-1184 L 19) and (3) clean the trash-can-sized waste-food buckets using high- pressure water which was so hot one of petitioner's supervisors admitted

being scalded by it (App 581 L 11-582 L 23,1154 L 13-1163,1123 L 5-1127,1120 L 11). This was dangerous, (App 1029 L 21-1031 L 4) painful, and not in line with what the doctors had instructed. At one point in April 1986 respondent tried to tell petitioner that the doctors had released her for regular duty (App 251,1289 L 20-1290 L 4), which was completely unverified, (App 251,595 L 13-24) not that it much mattered as the conveyors, oil-holding tanks, and buckets were regular duty jobs anyway (App 1177 L 19,1253 L 9 - 1254 L 16,1259 L 2-1269 L 6). Petitioner continued to try to work as requested, but she refused to allow respondent to further endanger her life or torture her.

The week ending March 22, 1986, petitioner worked 51.4 hours in six days. Her evaluation for April 3, 1986 told her

that, "She is not liked by most members [of the sanitation crew] as they feel they have to do extra work because she does not carry her part of the work" (App.223, 698 L.20-706 L.2, 771 L.21-772 L.13). In the extensive notes kept by her supervisors in their efforts to terminate her, there are no allegations that petitioner did not do the work assigned her. The resentment of petitioner's fellow workers was caused by her light duty assignments. Petitioner's supervisor testified that when petitioner's absences began causing him problems with his own responsibilties such that he asked for a extra temporary employee, he was told by the personnel manager, Bob Owens, that, as long as petitioner was on the payroll, petitioner's supervisor could not have more help and that the supervisor should "build a case and get rid of her" (App.

1261 L.7-1263 L.13, 533 L.2-536 L.4, 553 L.19-555 L.25, 936 L19-939 L.5, 1027 L.23-1029 L.2, 1272 L.2-1274 L.8). Respondent's plant manager, who set the tone for the plant he was over, testified, "Do I want impaired people working in that plant? No, I don't" (App.927 L.24).

One of petitioner's physicians approved her use of her injured arm to lift up to twenty-five pounds. Shortly thereafter, on March 31, 1986, petitioner reinjured her arm trying to lift a kerosene can and went to the hospital where she was given medication which made her feel too light headed to work (App.214, 217-9). When the plant physician saw her, he prescribed a series of TENS units and instructed that she not try any climbing or lifting (App.224-6, 231). Petitioner's physicians diagnosed

her as having bursitis and they began giving her injections which made her foggy. At this same time, petitioner's supervisiors were trying to make her work on overhead conveyors which could only be reached by a twelve-foot vertical ladder which had smooth, rounded metal rungs and lead to a catwalk high above the plant floor as shown by photographs in the record (App.227-31, 260). The plant manager considered this too dangerous to allow petitioner's photographer and lawyer, who had no disabilities, to attempt during discovery.

Petitioner was out April 10, 1986 due to the injection she received for the bursitis which she had developed. She was out April 11, 1986 because respondent was trying to make her work at the dangerous heights of the conveyors. She provided a doctor's excuse which her supervisor

described as saying "she was 'out of work due to arm'(note attached). I asked her how long she would be out since the note did not say" (App.229). Petitioner returned to work with a note from the plant physician instructing that she be given lighter duties. Respondent's reaction was to make her scrape the cooked-on oil, which petitioner's supervisor described as a "gue", off the oil-holding tanks in the plant's basement, a job which her supervisior admitted was usually done with caustic chemicals "using no manhours" (App.236, 248-9). Petitioner went to the emergency room on April 19, 1986 and brought a disability certificate from the plant physician, but respondent nevertheless counted the absence as unexcused. Her supervisiors told petitioner that it would do her no good to bring a

physician's statement after she was out because by then the paperwork counting her absences against her was already in. (App.237-42, 346, 221, 586 L.16-591 L.13, 1272 L.4-12, 1306 L.19-22). On April 22, 1986, petitioner saw the doctor who had operated on her wrist, but he "explained to her that an independant evaluation would no way [sic] relate to her present work status, as this is under the care of Dr. Tesseneer [the plant physcian]." (App. 244, 260). On April 26, 1986 respondent tried to tell petitioner that her doctors had released her for regular duty which was untrue. For petitioner to have tried to do the lifting and climbing which regular duty required would have been dangerous for her in her condition (App.251).

It was obviously of no use for petitioner to try to provide doctors'

excuses any more as respondent had told her such were not "excuses which would be accepted" and her private physician had told her that his opinion, for which she paid $168.00 would "no way relate to her situation at work" as that was under the control of the plant physicians, and, as of April 19, 1986, it was of no use for petitioner to bring a physician's statement from the plant physicians. Also, petitioner's supervisor's notes state that both respondent and petitioner "knew that she would to be evaluated by another Dr. [Dr. Royals]" who was in a different town and she had to be scheduled and test results obtained before her condition could be further diagnoised (App. 251,264,267-74). Petitioner could only wait and try to do her best in the face of an impossible situation (App.251). Respondent had, in

effect, cut petitioner off from obtaining any more physician's statements which might further restrict her work assignments or document the assignment's effects on her, while at the same time it was giving her work which was intolerable in her condition.

On June 23, 1986, after receiving a copy of Dr. Royals' report in which he saw one line which seemed to say what he wanted to hear, Mr. Owens, the personnel manager, called petitioner and told her, again falsely, that she had been released for regular duty work. When petitioner refused this dangerous directive, Mr. Owens did not call Dr. Royals or Dr. Tesseneer, both of whose later statements deny such an interpretation (App. 283, 286, 294-6), but called respondent's corporate headquarters and, after explaining the situation, recieved

permission to terminate petitioner. The personnel manager denied making such a call to corporate headquarters, but the plant manager revealed it in a later deposition (App.597 L.4-598 L.5,1004 L.18).

From January 30, 1986, the time when petitioner slipped and fell at work, until June 25, 1986, when she was fired, respondent's plant physicians instructed that petitioner's arm be keep in slings, casts, braces, and TENS units and, except for short trial-periods, they instructed that she was not to use the arm at all. During this time petitioner was never able to the essential duties of her regular job, which consisted of climbing on and around equipment and machinary, some of which was ten to twenty feet above the hard concrete floor of the plant and all of which was slippery from

the cooking oil which prevaded the snack food plant. Anyone doing the regular duties of the sanitation crew needed the use of both arms. The diagnosis which the physicians made available to respondent included "(1) chronic ligamentous sprain, right wrist (possible torn triangular fibro-cartilage) (2) carpal tunnel syndrome, right hand" (App.267-9) and (3) "acute bursitis" in her arm and shoulder (App.231, 260-1). The physician entrusted with her primary care, Dr. Tesseneer, noted "discussed poss. of chronicity of pain" and "said probably have prob. rest of life" (App 280). While the opinions below hold that in June one of petitioner's doctors opined that she could return to her regular duties at the plant, the physician, Dr. Royals, gave an affidavit for this case which states that:

> He cannot say that Ms. Fleming did not have an injury to her wrist and he did not attempt to make any determination as to whether she could resume her normal duties at work as he did not know what her duties were nor had he been asked to make such a determination" (App. 296).

Dr. Tesseneer's letter to respondent dated June 26, 1986 clearly shows that after seeing Dr. Royal's report, Dr. Tesseneer still instructed that petitioner not use her arm (App.283) and respondent took the position in petitioner's Employment Security Commission hearing that petitioner did not qualify for unemployment because her arm prevented her from doing the regular duties of her job.

REASONS FOR GRANTING THE WRIT

I

The Fourth Circuit's decision required petitioer to prove scienter in her actions under 29 U.S.C. §1132 and the first clause of 29 U.S.C. §1140 when the statutory lanuage does not support such a requirement.

The decisions below overlook the legal standard set out by 29 U.S.C. 1140 which reads in pertinant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant...for exercising any right to which he is entitled under the provisions of an employee benefit plan...or for the purpose of interfering with the attainment of any right to which such participant may become entitled..."

While the statute itself uses language requiring scienter or intent only in the language prohibiting interference with

the attainment of benefits, the opinion below and the opinions of other circuits have applied such a requirement to actual interference with plan benefits so as to eliminate, through ERISA's broad pre-emptive language, any possible cause of action for negligently or even recklessly depriving a person of his or her plan benefits. In this case, the opinions below adopted a scienter standard and, therefore, did not address facts which showed that petitioner's supervisors negligently and recklessly interfered with her ERISA plan benefits.

The statute at issue is a discrimination statute which is enforced in much the same way as statutes prohibiting discrimination based on race, religion, gender, age, et cetera. There are, however, few reported cases interpreting the substantive application

of this statute. Because of the importance of ERISA benefits to most working Americans and their families and because of the unparalleled pre-emption of State remedies for interference with ERISA benefits, this Court should consider granting a writ of certiorari in this case.

29 U.S.C. §1132(a)(1)(B), in relevant part, gives ERISA plan participants a civil action (1) to recover benefits due under an ERISA plan, (2) to enforce their rights under a plan, or (3) to clarify their rights to future benefits under a plan. This cause of action is in the nature of one sounding in contract and the intent to breach the agreement should have no bearing on the remedy for such a breach.

II

The Fourth Curcuit's decision required petitioner to show an interference with the attainment of an actual ERISA plan right when the second clause of 29 U.S.C. §1140 only requires that she show discrimination for the purpose of interfering with a possible attainment.

Contrary to the holding of the decisons below, petitioner did establish her disability during the relevant time period through medical opinions. The legal standard, however, does not consider whether petitioner could, in fact, have used her benefits had there been no discrimination, discipline, or discharge for the purpose of interfering with her rights. The legal standard which should apply in this case is whether petitioner was damaged, or even in jeopardy of being damaged so as to

justify injunctive relief, due to respondent's attempts to interfere with a right to which she "may" become entitled. If an employer fired an employee because he believed she has cancer and because he wants to avoid costs to his self-insured health, disability, and life insurance benefits, he has violated the statute quoted above and the employee is entitled to reinstatement, injunctive relief and damages, even if it turns out that the diagnosis of cancer was a mistake. The issue as to petitioner's discrimination case, therefore, is not what her health was, but what respondent believed it was or was likely to become.

In Gavalik v. Coninental Can Co. Inc., 812 F.2d 834,842(3rd. Cir. 1987) the trial court hed found that Continental had developed a program "to avoid future vesting of break-in-service

pension benefits" by not re-calling or re-hiring those persons with a break-in-service who had not vested, and that Continental's actions regarding certain plants and lines "were motivated in part by the desire to prevent employees from attaining eligibility [for vested pensions]...and in part by the declining business conditions...", but the district court concluded "that Continental's actions did not violate §510 of ERISA." The circuit court reversed this decision citing authority, at page 851, that a plaintiff does not have to show that discrimination was the sole reason for the adverse action. The Gavalik court goes on, at page 852, to point out that it does not matter whether the discrimination actually succeeds or even if the employee "would actually have received the benefits," if the defendant

intended to discriminate, it is responsible for the harm done.

In Gavalik at page 856, the court cites the "board, remedial objectives of §510," for the proposition that an employer's act "need not achieve the employer's illicit goals [as required in most discrimination cases]" (emphasis added), and held:

> Because the district court construed §510 [29 U,S.C. §1140] as requiring actual deprivation of rights, it failed to consider...deliberate steps undertaken for the purpose of interfering with...pension eligibility. When so understood, it is clear that the district court's own findings are evidence of appellants' satisfaction of their burden to establish by a preponderance of the evidence that the plan was infested with discriminatory intent sufficient to constitute a violation of ERISA."

The court, therefore, held that regardless of any resulting harm, the

plaintiffs were entitled to the injunctive relief requested. Petitioner would argue the same applies to her request for injunctive relief.

III

The Fourth Ciruit's opinion does not address the inherently discriminatory effect of respondent's policy of terminating plan participants who exceed the plant average of absences and makes no meaningful exception for absences related to the use of health or disability plan benefits.

The decision overlooks the inherently discriminatory effect of respondent's policy of termimating employees who exceed the plant average of absences without considering the connection between the absences and the employee's potential disability. See,

Gavalik v.Continental Can Co., 812 F2d 834 (3rd Cir. 1987).

The court in Gavalik analyzes the McDonnell Douglas Corp.v. Green, 411 US 792, 93 S.Ct. 1817, 36 [Ed 2d 668 (1973) "shifting burdens" mechanism and, at page 853, the Gavalik court holds it inapplicable where the plaintiff's case consists of "direct 'smoking-gun' evidence that the employer acted with discriminatory motivation" stating that where "direct evidence is available, problems of proof are no different than in other civil cases." Petitioner contends that respondent's policy of terminating employees who exceed the plant average for absences is an inherent and direct pattern and practice of discrimination against employees who have rights under respondent's health and disability benefits plans and who begin

to use those rights. In Gavalik, Continental Can had a computer system called the Bell System which was designed to (1) identify employees whose pensions had not vested, (2) lay them off, (3) alert management if one of these employees was to be recalled, and (4) adjust production so as to avoid the need for such recalls. Continental used the system for "liability avoidance." While the system used by respondent is not as refined and exact as the one used by Continental, it has the same predictable and impermissible effect.

In her article, "Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?", Notre Dame Law Review, Vol. 62, No. 5 (1987), Joan Vogel has a section beginning on page 1029

entitled "Targeting Medical Risks" which reads:

> This section will explore four general ways that the employer might seek to lower its insurance costs. (1) by dismissing sick and injured employees;...and (4) by establishing rules on absenteeism which result in discharging employees before they qualify for benefits.
>
> ****
>
> If employees can lose their jobs just because they need their insurance or if they can be fired because they pose risks of insurance claims in the future, few could afford the care they need, and the many safeguards in ERISA would be vitiated.

In a sub-section entitled "Absenteeism and Leave Policies" at page 1040, Professor Vogel writes:

> Absentee policies can take a number of forms.First, some employers only excuse absences if the employee's illness falls under an approved list.
>
> ****

Other employers limit even the number of excused absences so that a victim of heart disease or cancer could be terminated before becoming eligible for disability benefits or leave.

****

The employer might also severely limit the number of days off and, perhaps, provide no sickness and accident insurance policy to cover the employee before he or she would be eligible for long term disability benefits.

****

Here the employer would argue that the intention is not deprivation of benefits but deterrence of excess absenteeism, a legitimate concern. Yet there are ways of promoting that interest-such as by requiring a doctor's certificate or a physical exam to show that the medical condition is genuine-that do not deprive employees of benefits when they need them.

IV

The Fourth Circuit's decision failed to address petitioner's action for damages and injunctive relief under 29 U.S.C.

§1132 based on an intentional interference with her short term disability benefits for her migraines and on her entitlement to long term disability benefits.

Petitioner plead respondent's promises regarding benefits and that she "is entitled to all the remedies allowed under 29 U.S.C. 1132 [the codification of §502] including...recovery of benefits due her under these plans"(App 21-4,30). She requested as relief an order determining "her rights under defendant's plan" (App 34-5). As the Court noted in Conkwright v.Westinghouse Elec. Corp., 933 F2d 231, at 237 (4th Cir 1991) "§§502 and 510 together protect the panoply of rights at risk in the...[benefits] context". Petitioner was fired before she met respondent's qualifications to file a claim. All of respondent's materials told

petitioner that her rights to benefits terminated when she was terminated (App 395,385,386,987 L 22). In its order signed July 3, 1990, the District Court held that petitioner's suit was notice enough of her claim (SuppApp). Despite its fiduciary duties (App 1367 L 14,1411 L 2), respondent has made no attempt to evaluate the merits of petitioner's claim.

V

The Fourth Circuit's decision does not address respondent's ERISA plan's definition of what constitutes "total disability" for purposes of meeting the six month waiting period required to qualify for long term disability benefits.

The decisions below found no evidence of petitioner's being disabled or qualifying for disability, but this overlooks the legal standard for

disability set out in respondent's ERISA documents, which read in pertinent part:

> The Term Totally Disabled or Total Disability means,
>
> (a) during the Waiting Period plus the first twenty-four months of absence from work due to disability thereafter,(i) the inability of a Covered Employee to perform any and every duty of his or her regular occupation ... and
>
> (b) after the Waiting Period plus the first twenty-four months of absence from work due to disability thereafter,(i) the complete inability of a Covered Employee to engage in any and every duty for which the Covered Employee is or becomes reasonably qualified by training, education or experience.

As can be seen, the definition of the "total disability" required to qualify for long term disability is the same for the six-month waiting period required before long-term disability begins and for the first twenty-four months that the employee receives

disability benefits. If one looks at the documents which respondent gave petitioner to rely upon, the standard was stated as "Once LTD Plan benefits start, they will continue for the next two years if you are not able to perform the essential duties of your job" (App.391). The decisions below held that petitioner was not disabled as no doctor diagnosed her as disabled or recommended that she stop working due to her arm injury. The first of these holdings is contrary to the evidence and the second overlooks the evidence that short-term disability benefits were not available for job-related injuries (App.380).

Respondent's management testified that with job-related injuries they would make the employee continue to come in to work and would give her light duty work which was as easy as necessary (App.925

L.17-8, 926, 1119 L.11-7, 927 L.24). Thus, the fact that petitioner continued to try to work has no relationship to whether she was disabled from doing the essential duties of her job. A better indicator is respondent's actions when petitioner's hand was previously operated on for a non-job-related injury. Then respondent continued her short-term disability payments based on her doctor's statement that "she still had <u>some limitation of motion</u> of the thumb and still had <u>some tenderness</u> [and therefore] she is not yet able to return to her regular work" (App.151,501,124,502 L.4). Long-term disability applies to work related injuries after the employee has been given light duty work for a six-month waiting period (App.389). When the injury is not work related, Mr. Owens explained "If the doctors are saying she

is unable to do her regular job, then...I file a [disability] claim" (App.498 L.19-24). Just as respondent will hold a job for six months while an employee is on short-term disability if the disability is not job-related, respondent will make light duty work available for the six-month waiting period before long-term disability benefits begin if the injury is work related. The failure of the courts below to recognize the criteria applied to the waiting period when an employee is on light-duty work has resulted in the improper result which has been reached in this case.

As to the decisions' other point, petitioner obviously had medical evidence of her disability with migraines and related symptoms and obviously was within weeks of qualifying for long term disability because of the migraines as of

April 17, 1986. The decisions below overlook this and overlook evidence that petitioner was in fact disabled by her arm from January 30, 1986 to June 25, 1986, when she was officially terminated, and that she continued to be disabled thereafter.

CONCLUSION

Petitioner's short term disability benefits for her disability caused by migraines, etc. were illegally terminated by respondent in 1985. Respondent disciplined and discriminated against petitioner with warnings that were later used to terminate her because she was absent due to migraines covered by respondent's ERISA plans. The opinions below fail to address this at all. Respondent's own plant doctors' opinions can only be read as an opinion that petitioner could not do the essenial

duties of her job as she was never able to use her right hand at work after January 30, 1986. By the time she was fired on June 25, 1986, petitioner was approaching the sixth month of the waiting period required before long-term disability would begin. That petitioner would have qualified for long-term disability is clear; that respondent had doctors' reports and its management could see for themselves that petitioner was likely to use her benefits, is beyond dispute.

The decision of the Fourth Circuit required petitioner to meet a scienter standard which the statutory lanuage does not require. It did not consider petitioner's claims for the loss of her benefits or for injuntive relief. It required petitioner to prove that respondent's purposeful discrimination

interferred with the actual attainment of a benefit, rather than merely proving damages as a result of an intent to discriminate. These are substantial errors of law which have deprived petitioner of her rights under the applicable statutes.

For these reasons as discussed above, this petition for certiorari should be granted.

Respectfully submitted,

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Counsel of Record

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

KATHY FLEMING,
Plaintiff-Appellant,

v.

BORDEN, INCORPORATED,
Defendant-Appellee.

No. 92-2009

Appeal from the United States District Court
for the District of South Carolina, at Spartanburg.
G. Ross Anderson, Jr., District Judge.
(CA-89-2839-7)

Argued: June 8, 1993

Decided: June 28, 1993

Before PHILLIPS, LUTTIG, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Charles Richard Kelly, Columbia, South Carolina, f
Appellant. Melegia Lee Daniels, Jr., DANIELS & BRANDO
Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. S
I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Kathy Fleming brings this appeal from an order of the district court granting summary judgment to Borden, Incorporated, on Fleming's claim under the Employee Retirement Income Security Act ("ERISA"). We affirm.

Fleming began work on the sanitation crew at Borden's snack food factory in Spartanburg, South Carolina in 1981. Various non-occupational health problems forced her to take several extended leaves of absence during the period from 1983 through 1985, during which times she collected short-term disability benefits under Borden's employee benefits plan. Even when not on disability leave, however, Fleming frequently missed work. She was warned by her supervisors in June 1985, and again in December of that year, that her absences were becoming excessive, and instructed to improve her attendance.

On January 30, 1986, Fleming hurt her right arm while at work. Borden assigned her to light duty that would not require the use of her injured arm. Fleming's attendance record, however, continued to worsen after the injury. While she sometimes performed her newly assigned tasks for days or weeks without incident, at other times she missed work or left her shift after only a few minutes, allegedly due to pains in her arm. Although appellant was under the care of at least five physicians for various ailments, none diagnosed her as disabled or recommended that she stop working. Fleming's supervisors repeatedly warned her, both orally and in writing, that her absenteeism was placing her job in jeopardy. On June 23, 1986, after one of appellant's doctors opined that she could return to her regular duties at the plant, Fleming received a final warning. She failed to work a full shift the next two nights. On June 25, having missed at least sixty days of work in 1986, Fleming was terminated by Borden due to excessive absences.

Fleming filed suit in South Carolina state court against her former employer, alleging contract and tort causes of action stemming from her dismissal. Borden removed the action to the district court, which

hen allowed Fleming to amend her complaint to add an ERISA claim, namely that Borden had discharged her in order to prevent her rom qualifying for long-term disability benefits under appellee's benefits plan, in violation of ERISA section 510, 29 U.S.C. § 1140.* The listrict court remanded the state law claims to state court. Upon their lisposition, Borden moved for summary judgment on Fleming's ERISA claim.

The district court granted the motion. Applying the framework set forth in *Conkwright* v. *Westinghouse Elec. Corp.*, 933 F.2d 231 (4th Cir. 1991), the court held that Fleming had failed to establish a *prima facie* case of discriminatory discharge under section 510. While Fleming claimed to have been nearing the twenty-seven week disability threshold required for elibility for long-term benefits at the time she was terminated, the district court noted that she never actually established, through medical opinion or otherwise, that she was in fact disabled at any time between her injury on January 30, 1986, and her dismissal five months later. Thus, far from approaching eligibility for long-term benefits, Fleming had not even satisfied the prerequisite necessary to start the disability clock running. Moreover, the district court concluded that there was no evidence that the supervisors who fired Fleming had ever even considered the possibility that she might be proceeding toward eligibility for long-term disability benefits at the time they discharged her. Since Fleming was unable to produce any evidence of a causal connection between her membership in the benefits plan and her discharge, an essential element of her ERISA claim, the district court held that Borden was entitled to judgment.

We have read the briefs, heard oral argument, and given full consideration to Fleming's contentions. Finding no error in the thorough opinion of the court below, *Fleming* v. *Borden, Inc.*, No. 89-2839-7 (D.S.C. July 9, 1992), and agreeing that appellant failed to establish her disability through medical opinion during the relevant time period, or to provide any evidence of a causal link between her dis-

*"It shall be unlawful for any person to discharge . . . a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the [employer's benefits] plan." 29 U.S.C. § 1140.

charge and her membership in the Borden benefits plan, we affirm on the reasoning of the district court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

SPARTANBURG DIVISION

KATHY FLEMING, Plaintiff,	)	
vs.	)	C. A. No. 7:89-2839-3
BORDEN, INC., Defendant.	)	

MEMORANDUM OF DECISION AND ORDER

This matter comes before the Court on defendant's Motion for Summary Judgment. Plaintiff's Complaint, as amended, alleged numerous violations of state law, based on both contract and tort theories, as well as a federal claim alleging discriminatory discharge, in violation of Section 510 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1140. Plaintiff's state law claims were remanded

to state court and resolved there. This Court will not consider them further. For the reasons stated below, the Court grants summary judgment to defendant on plaintiff's ERISA claim.

FACTUAL BACKGROUND

Plaintiff was employed at defendant's snack food plant in 1981. In 1985, she took extended leaves of absence, one for an operation on her thumb and one for migraine headaches. She drew short-term disability benefits each time. She was also absent from work on several other days in 1985 for various reasons. She was given two warnings in 1985 for excessive absences. Her leaves of absence were not counted toward her absence record. On January 30, 1986, plaintiff suffered an injury to her wrist at work. She returned to work the next day on light duty and, despite her injury, was able to work her regular hours until the middle of April,

1986. She saw several doctors concerning her injury. None expressed an opinion that she should not be working, although she was restricted to duties which did not involve use of her right arm. During March, she was given a third warning for excessive absenteeism for absences unrelated to her injury.

After the middle of April, plaintiff never worked a full shift. She would come in, work for a short while, and leave, complaining of her arm hurting. She was informed by her superiors that her leaving would be considered an unexcused absence unless she brought a note from the doctor saying she couldn't or shouldn't be working. Plaintiff contends that she was not able to stay at work during this time because she was given jobs which required her to use her right arm and/or made her right arm hurt. While plaintiff did see several doctors between the middle of

April and her discharge, none of them ever expressed an opinion that she should not be working. Plaintiff was given another written warning, specifically about her problems with unexcused absences, on June 12, 1986.

In late June, defendant received a notice from an orthopedic specialist to whom plaintiff had been referred to the effect that he felt she could return to her normal duties. Plaintiff was informed of this. When she did not work a full shift the next two nights, she was terminated for excessive absenteeism on June 25, 1986.

ERISA CLAIM

Under Section 510 of ERISA, it is unlawful to discharge an employee for the purpose of interfering with the attainment of any right to which they may become entitled under an employer's benefit plan. Plaintiff contends that the true reason

for her discharge was to get rid of her before she qualified for long-term disability under the defendant's plan.

The Fourth Circuit has determined that a plaintiff must show specific intent by a defendant to violate Section 510 in order to recover. Conkwright v. Westinghouse Electric Corp., 933 F.2d 231 (4th Cir. 1991). This may be accomplished through direct evidence of discrimination or the use of the prima facie case analysis used in race and age discrimination cases. Plaintiff has no direct evidence of discrimination. For a Section 510 action, the prima facie case consists of four elements:

1. Membership in a benefit plan;

2. Job performance at a level that meets the employer's legitimate expectations;

3. An adverse employment decision; and

4. Some evidence which establishes a causal connection between the

employment decision and membership in the benefit plan.

Viewing the evidence and any reasonable inferences from the evidence in the light most favorable to plaintiff, as the court must do on a summary judgment motion, plaintiff has produced no evidence which is sufficient to supply a causal connection between her discharge and the long-term disability plan.

Plaintiff argues that she was well on her way to qualifying for long-term disability when she was discharged, and this supplies the necessary causal connection. Under defendant's plan, an employee must be disabled for six months in order to qualify for long-term disability. There is a dispute between the parties concerning the standard used by the plan to determine eligibility for long-term disability. Plaintiff alleges that the following language should be used

to determine eligibility:

> Once Long Term Disability Plan benefits start, they will continue:
>
> * for the next two years if you are not able to perform the essential duties of your job, and ...

Plaintiff argues that she could not perform the essential elements of her job from the date of her injury in January until her discharge in June, a period of five months. The language cited by plaintiff, however, applies only after an employee has qualified for long-term benefits. This language is the standard used to determine continuation of benefits for up to a two-year period following the six-month waiting period. Defendant points to language in the plan which requires total and continuous disability for the six-month waiting period in order

to qualify for long-term disability benefits.

It is not necessary, however, for the Court to resolve this question, since it is clear that a medical opinion is required under the plan to qualify for disability. Plaintiff has presented no expert medical opinion which would satisfy either the requirement that she was unable to perform her essential job duties during this period or that she was totally and continuously disabled. In fact, the uncontroverted evidence is that she worked her regular schedule for two and on-half months of the five-month period she claims. For the other half of this period, even though she left work on a regular basis, the opinion of the medical experts who treated her was that she was able to work. Clearly, plaintiff's claims of pain caused by her job duties would not have been sufficient, by themselves, to

qualify her for disability benefits. Moreover, even had she presented medical evidence of disability, in order to supply the required causal connection, she would have to show that defendant was aware of and concerned about her growing eligibility for long-term disability. She has provided no evidence from which this Court could conclude defendant even considered the question of whether she was proceeding toward eligibility. The agents of defendant who discharged her denied any knowledge of her eligibility. There is no evidence of any communications between them and the administrator of the long-term benefits plan in Columbus, Ohio, relative to her eligibility.

Plaintiff contends that defendant would save money by discharging her prior to her becoming eligible for benefits. While the only evidence in the record seems to indicate the long-term benefits

were funded by employee contributions, the fact that defendant might save money by discharging plaintiff, even if true, by itself, is not sufficient to supply a causal connection. Conkwright, supra at 239. See Dister v. Continental Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988). If that were true, any actions by an employer that resulted in cost savings would be evidence of discrimination.

Finally, plaintiff argues that defendant's attendance policy inherently discriminates against persons who seek to qualify for disability. This Court need not determine if an attendance policy which is inherently discriminatory supplies the requisite specific intent required under Section 510, for in no way can the instant policy be considered inherently discriminatory towards employees who may be eligible for disability payments. The attendance

policy at issue allows for necessary absences. If an employee exceeds the plant's average absenteeism rate, they are given several opportunities to improve before discharge occurs. The policy gives due regard for those people who may suffer from disabling medical conditions by providing for leaves of absence, which are not counted against an employee's attendance record. Plaintiff contends she was fired for her attendance before she could qualify for long-term disability. Yet, her absence record for one and one-half years, not just six months, was considered in discharging her. The reason her absences were counted against her was because she never secured a medical opinion which would have qualified her for a leave of absence, not because of an inherently discriminatory policy. This case is not at all like Gavalik v. Continental Can Co., 812 F.2d 834 (3d Cir.

1987), as plaintiff suggests.

Since plaintiff has no evidence which would tend to prove a causal connection between her discharge and her membership in the disability plan, summary judgment is proper. Even if plaintiff could present a prima facie case, her excessive absenteeism under defendant's policy provides a legitimate, non-discriminatory reason for her dismissal. Plaintiff has presented no evidence from which the Court could reasonably conclude that this reason was a pretext for benefits discrimination. In response to a well-supported motion for summary judgment, "a plaintiff must adduce facts, which if taken as true, could enable a jury to identify unlawful intent from the various other reasons why an employer might have terminated plaintiff ..." Conkwright, supra at 239. This the plaintiff has not done. Her failure mandates entry of summary judgment in

favor of defendant.

IT IS THEREFORE ORDERED that defendant's Motion for Summary Judgment be granted, and plaintiff's Complaint be dismissed with prejudice in its entirety.

IT IS SO ORDERED.

(s) G. Ross Anderson, Jr.
United States District Judge

Anderson, South Carolina
July, 1992

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED July 23, 1993

No. 92-2009

CA-89-2839-7

KATHY FLEMING

Plaintiff-Appellant

v.

BORDEN, INCORPORATED

Defendant-Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

The applicant's petition for rehearing and suggestion for rehearing in banc were

submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

Supreme Court, U.S.
FILED
NOV 19 1993
OFFICE OF THE CLERK

No. 93-641

In The

Supreme Court of the United States

October Term, 1993

KATHY FLEMING,

Petitioner,

vs.

BORDEN, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

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No. 93-641

In The

Supreme Court of the United States

October Term, 1993

KATHY FLEMING,

Petitioner,

vs.

BORDEN, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

Respondent, Borden, Inc. by and through its undersigned attorney, respectfully requests that petitioner's request for writ of certiorari to the Fourth Circuit Court of Appeals be denied.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

29 U.S.C. Section 1132(a) "Persons empowered to bring a civil action" provides:

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USC Section 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USC Section 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (1).

29 U.S.C. Section 1140 "Interference with Protected Rights" provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 USC Section 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 USC Section 1132] shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

PRIOR PROCEEDINGS

Pursuant to Supreme Court Rules 15.1 and 24.2, respondent Borden, Inc. (hereafter "Borden") offers its own statement of the case.[1] Petitioner sued Borden following her discharge, and alleged, among other causes of

[1] Pursuant to Supreme Court Rule 29.1, Borden discloses that it is a general partner in BCP Limited Partnership (NYSE). There are no other parent or subsidiary corporations except for wholly owned subsidiaries.

action, a cause of action for violation of the anti-discrimination provisions of Section 510 of the Employee Retirement Income Security Act (ERISA), codified at 29 U.S.C. Section 1140. Specifically, petitioner alleged that she had been discriminated against for her exercise of rights under Borden's disability plan, a welfare benefit plan regulated by ERISA, and for the purpose of interfering with the attainment of rights under the disability plan to which she might have become entitled in the future. [Jt. App. 28, para. 63] Petitioner additionally alleged that her legal rights under these plans terminated at the time her employment ended. [Jt. App. 28-29, para. 64] Petitioner requested as relief for the alleged violation of Section 1140 all the remedies available under 29 U.S.C. Section 1132, the civil enforcement section of ERISA. Section 1132 allows injunctive and other equitable relief as well as legal relief.

The District Court granted summary judgment on petitioner's Section 1140 claim, holding that petitioner had presented "no evidence which would tend to prove a causal connection between her discharge and her membership in the disability plan. . . . " [Petition App. at 16] Petitioner had argued that the perception at Borden was that she was or soon would be eligible for long-term disability benefits, and she was discharged to prevent her from successfully carrying through with a claim. [Petition at 5] The court found, however, that she could not even create an issue of fact as to whether she was progressing toward eligibility under the long-term disability plan (which required a waiting period of six months of disability), since she presented no medical testimony either that she was "totally disabled," or that she was "unable to

perform the essential functions of her job." The court additionally held that even had she been able to establish growing eligibility for disability benefits, she would have to show that Borden was "aware and concerned about her growing eligibility. . . . " This she was unable to do. [Petition App. at 10-13]

On appeal to the Fourth Circuit, the panel adopted the District Court's reasoning in its decision filed June 28, 1993. [Petition App. at 1] Petitioner moved for rehearing, which was denied by the Court of Appeals on July 23, 1993. Petitioner filed this petition with the Clerk of the Supreme Court on October 21, 1993, and it was received by Borden's counsel on October 22, 1993.

STATEMENT OF FACTS

Petitioner's statement of facts is argumentative, and many of her statements are not supported by the record. Therefore, Borden details the undisputed material facts below. Borden then rebuts petitioner's arguments and misstatements in a separate argument.

Petitioner was hired by Borden in 1981. Near the time of her hire, she was given a plant rules booklet, which provided in its rule on absences that excessive absences for any reason could subject an employee to termination. [Jt. App. at 359] In practice, Borden management used the average absenteeism rate for the plant as a rule of thumb to define excessive absenteeism. Whenever an employee's absence rate began to exceed 1.5 to 2.0%, they would be counseled. If their attendance failed to improve after repeated counseling, they could be discharged. [Jt. App. at 555] Medical leaves of absence, along with other

absences such as bereavement leave, military leave, and jury duty, were not counted towards excessive absenteeism. [Jt. App. at 341]

In 1985, petitioner was on a medical leave of absence in January and February due to an operation on her thumb. She returned to work on February 28, 1985. While on leave of absence, she drew short-term disability benefits through Borden's disability plan. She had previously drawn short-term disability benefits for other non-work-related medical problems. After returning to work, she experienced attendance problems. On June 29, 1985, she was issued a written warning on her attendance, which indicated that she had 18 absences in addition to 50 days' medical leave. She was informed these absences were excessive and she needed to bring them under control. [Jt. App. at 349]

She requested and was granted another medical leave of absence on July 9, 1985, due to a problem with headaches. She drew short-term disability benefits for this condition as well. She returned to work on November 18, 1985. [Jt. App. at 346] On December 21, 1985, she was issued a second written warning concerning her attendance. Since returning from her leave (a period of 24 working days) she had missed two days and gone home sick once. She again was informed that she needed to improve her attendance. [Jt. App. at 350] She left work early the night she received this warning. [Jt. App. at 346]

On January 30, 1986, petitioner suffered an on-the-job injury to her wrist. [Jt. App. at 87] She was released for light duty shortly after this injury. [Jt. App. at 208] She returned to work, but her attendance did not improve.

On March 11, 1986, she was given another written warning on attendance. While five days out with her wrist injury were not counted against her, she had six absences not related to her injury. This communication informed her that failure to improve her attendance would result in termination. [Jt. App. at 352] While petitioner's attendance improved slightly right after the reprimand, she soon developed another attendance problem.

While she had been released for light duty shortly following her wrist injury, in April of 1986 she began to leave work early almost every night complaining of pain. Even though she was seen by no less than five physicians for her wrist injury, none of them ever opined that she was disabled by her condition. [Jt. App. at 368-73] No doctor ever issued an opinion that she could not work light duty. [Jt. App. at 338, 342] Even after she began to leave work early consistently, working only an hour or two each night, her doctors' opinions about her ability to work light duty did not change.

On June 12, 1986, petitioner was given her fourth written warning on attendance. This warning recited that she had developed a pattern of leaving early even though the doctors were saying that she could work light duty. At this point, she had 41 unexcused absences. [Jt. App. at 355] On June 23, 1986, she was released to return to normal activity with her wrist by the orthopaedic expert treating her, Dr. Daggett Royals. [Jt. App. at 366] Petitioner worked only one hour the night she was informed of Dr. Royals' opinion. She missed the next night completely. She was discharged when she next returned to work. [Jt. App. at 347]

Petitioner would not have been eligible to draw short-term disability benefits under Borden's plan for her wrist injury, due to the fact that it was an on-the-job injury. [Jt. App. at 380] She could have received a medical leave of absence had a doctor certified she was unable to work. This, of course, never occurred.

REBUTTAL OF PETITIONER'S FACTUAL ARGUMENT

Petitioner is confused regarding the standard for a medical leave of absence. Petitioner, on page 10 of her petition, equates any absence which has a doctor's excuse as a leave of absence. However, Borden's attendance policy counts absences for any reason towards excessive absences. Medical leaves of absence are excluded, but must be applied for, approved, and supported by medical opinion of a disability from working for a significant period of time. This program is designed to allow time to take care of serious medical problems, not designed for day-to-day sickness.

Petitioner also claims that her 18 absences in 1985 were related to a condition (headaches) for which she later took a leave of absence, and thus should not count against her. Even if this is true, it is difficult to see how it aids any of petitioner's legal arguments. One should never reach that point of analysis, however, for there is no opinion in the record either that these absences were related to headaches or that any headaches disabled petitioner from working prior to the beginning of her leave on July 9, 1985. Prior to her medical leave, she was seen on most of these 18 absences by her family physician, Dr.

Bannon. No indication of headaches appears on Dr. Bannon's notes until June 28, 1985. Rather, they indicate such things as vertigo, depression, hypoglycemia, and sore throat. The note on June 28 does not indicate she is disabled by headaches. The other notes relating to headaches appear after her leave of absence began. [Jt. App. at 152-54] Petitioner also mentions doctor's visits on August 14 and September 17, 1985, but of course, these visits were within her leave of absence and were not counted against her. [Petition at 11-12]

Petitioner next contends that absences following her leave of absence were also related to her migraines, that these absences were counted against her, and that she was not granted short-term disability benefits for these absences. Borden's short-term disability plan does provide that recurrence within 90 days of a condition for which short-term benefits were received can result in eligibility for further benefits. There are two problems with petitioner's assertion: (1) she never applied for benefits for the alleged recurrences; and (2) there is no evidence in the record that any medical conditions arising within 90 days after the end of her short-term disability on November 18, 1985, were in fact due to further migraine problems.

Petitioner mentions several dates, December 30, 1985, January 17, February 26, March 16, and April 29-30, 1986. Petitioner was seen by Dr. D. W. Nicholson on December 30, 1985, but for a problem with pain, decreased and double vision in her left eye of *unknown etiology*. [Jt. App. at 174-75] On January 17, 1986, petitioner had a CT scan performed at Dr. Nicholson's request for her vision problem. [Jt. App. at 174] Again, there is no connection to

headaches. There is no record of a doctor's visit on February 26, 1986, nor is there a record of a doctor's visit on March 16, 1986. There was a visit on March 26, 1986, as well as April 29 and 30, 1986, to Dr. Carol Nichols for headaches. That these visits were for headaches, however, is documented in the record only by a supervisor's note. [Jt. App. at 258] Nothing indicates any disability. Nor were these last visits within 90 days of November 18, 1985.

Petitioner admits that even after her wrist injury, she missed days from work that were not due to either her migraines or her arm injury. She missed three days, February 13, 14, and 15, with the flu [Petition at 21], and missed March 6, 7, and 8 with a stomach problem. [Petition at 22-23] Given her already dismal attendance record during 1985, it is a small wonder she was given another written warning for these six work days missed within a span of 30 calendar days. [Jt. App. at 347]

Finally, petitioner claims she was constructively terminated. [Petition at 28] Petitioner never raised an issue of constructive termination in the courts below. Her theory of constructive termination appears to be that she was given dangerous, painful work to do that violated her doctors' restrictions. [Petition at 29] This is difficult to understand, however, when on the next page petitioner maintains her fellow workers resented her because of her light duty assignments. [Petition at 30] Petitioner argues that after April, Borden in effect cut her off from obtaining any more physicians' statements which would have further restricted her work assignments. [Petition at 36] This is simply not true. She was seen on May 5, 1986, by Dr. McClure and on May 19, 28, and June 18, 1986, by Dr.

Royals. At no time did either doctor recommend additional work restrictions. [Jt. App. at 260, 267-69, 277] During this time period, petitioner worked a total of 40.9 hours in 35 scheduled days of work. [Jt. App. at 347] These visits to physicians, rather than resulting in additional restrictions, resulted in Dr. Royals' advice on June 18, 1986, that she "return to normal activity with her wrist." [Jt. App. at 277]

SUMMARY OF ARGUMENT

The petition seeks to raise an issue concerning the required intent necessary to violate Section 1140. The petition fails to properly raise this issue. Even if this issue is properly raised, the petition provides no reason for the Court to grant certiorari. The Courts of Appeal to have considered the issue are unanimous in requiring specific intent as an essential element for a violation of Section 1140. The requirement of specific intent is a well settled question of law. The requirement of specific intent imposed by the Courts of Appeal is faithful to the statutory language which prohibits only actions taken *because* of the exercise of a right protected by ERISA. To imply, as does petitioner, that this Court should establish a cause of action for negligent or reckless discrimination is absurd.

Both the District Court and the Court of Appeals viewed this case as arising under the second clause of 29 U.S.C. Section 1140 since petitioner was discharged prior to becoming eligible for long-term disability benefits. The

second clause specifically relates to purposeful interference with the attainment of a right, rather than discrimination for exercising a right. The petition raises no question regarding the requirement of intent for this second clause. The petition does raise a question regarding the requirement of intent with respect to the first clause, which prohibits discrimination for exercise of rights under a plan. Since neither court below considered this case under the first clause, however, the question as to whether specific intent is required under the first clause raised by the petition is not properly before this Court.

The Court of Appeals did not require petitioner to prove entitlement to a future benefit as an essential element of her claim, as she asserts. Rather, it is clear that both the District Court and Court of Appeals looked at her eligibility for long-term disability only because of her assertion that it provided a causal connection between her membership in the plan and her discharge. Both determined that a causal connection could not possibly be shown by this evidence because it failed even to raise a factual issue as to her growing eligibility under the plan. The District Court commented:

> Moreover, even had she presented medical evidence of disability, in order to supply the required causal connection, she would have to show that defendant was aware of and concerned about her growing eligibility for long-term disability. She has provided no evidence from which this Court could conclude defendant even considered the question of whether she was proceeding toward eligibility.

[Petition, App. at 13] The Fourth Circuit adopted this reasoning. [Petition, App. at 3]

The attendance policy administered by Borden does not supply direct evidence of discrimination in violation of Section 1140 because it is not inherently discriminatory. Its provisions for not counting medical leaves of absence and short-term disability against attendance records allows for recuperation from serious medical conditions. The policy does not single out potential disabled persons before they can qualify for these benefits. In fact, Borden had been dealing with petitioner's attendance problems for at least 18 months prior to her discharge. The fact that the policy includes absences due to sickness does not make it inherently discriminatory. Borden must have sufficient attendance to operate the plant efficiently, regardless of the cause of the attendance problem.

Petitioner simply failed to raise any genuine issues of material fact as to whether Borden, in discharging her, was motivated by her participation in its disability plans. The definition of disability in the plan was not a material fact on the issue of motivation due to the fact she did not comply with the undisputed requirement of providing medical evidence of disability. This narrow holding should not be disturbed by the Court.

This case does not present any major policy issues under ERISA, or even call for clarification of legal principles used in the enforcement of ERISA discrimination provisions. Rather, it presents only a question of the failure of petitioner to present proof sufficient to support her claims. The District and Appellate Courts dutifully searched the record for such proof and found

none. There is no reason for this Court to duplicate those tasks.

ARGUMENT

I. THE PETITION SEEKS TO RAISE AN ISSUE NOT ADVANCED IN THE COURTS BELOW.

Petitioner's first argument asserts that the Fourth Circuit required her to prove specific intent to discriminate in violation of Section 1140. She claims that the first clause of Section 1140 cannot be read to support such a requirement, and that a requirement of intent is only applicable to the second clause. The first clause of Section 1140 makes it unlawful to discharge or otherwise discriminate against a participant in a benefits plan *for* exercising any rights to which they are entitled under the plan. The second clause prohibits discharge or discrimination for the purpose of interfering with the *attainment* of any right to which a participant may become entitled. 29 U.S.C. Section 1140 (1986).

Petitioner's argument is not properly before this Court since the case in both the District Court and the Court of Appeals was prosecuted under the second clause of Section 1140. The District Court found "plaintiff contends that the true reason for her discharge was to get rid of her before she qualified for long-term disability under the defendant's plan." [Petition, App. at 9] The Court of Appeals concurred, and cited only the second clause of Section 1140 in rendering its opinion and decision. [Petition, App. at 3] Petitioner's amended complaint alleges intentional action:

> Defendant's reason for the adverse employment actions it took against plaintiff were to interfere with Plaintiff's existing or future rights under the Plans or such were at least a substantial or motivating factor behind defendant's actions . . .

[Jt. App. at 29, para. 65] She was not eligible for long-term disability as of the date of her termination. [Jt. App. at 343; Petition at 5] Regardless of whether one considers either occupational or non-occupational causes, petitioner failed to satisfy either the medical requirements or waiting period for long-term disability. [Petition at 16-17, 37] Therefore, her action can only be seen as one of interference with future attainment of benefits. Petitioner agrees that specific intent applies in such a case. [Petition at 40-41] Since her case was not decided by either lower court on the basis of the first clause of Section 1140, she cannot properly raise the issue of whether intent is required in the first clause.

II. THE COURTS OF APPEAL ARE UNANIMOUS IN APPLYING A SPECIFIC INTENT REQUIREMENT TO SECTION 1140.

The Fourth Circuit's holding that petitioner must show a specific intent to interfere with her attainment of benefits was proper. This issue has now been considered by all circuits except the First Circuit Court of Appeals and the Federal Circuit Court of Appeals. The circuits who have considered the question have been unanimous in requiring specific intent to violate Section 1140:

> Section [1140] was designed primarily to prevent 'unscrupulous employers from discharging

> or harassing their employees in order to keep them from obtaining vested pension rights. An essential element of plaintiff's proof under the statute is to show that an employer was at least in part motivated by the specific intent to engage in activity prohibited by [Section 1140].
>
> On the other hand, '[n]o ERISA cause of action lies where the loss of pension benefits was a mere consequence of, but not a motivating factor behind, a termination of employment.'

Dister v. Continental Group, Inc., 859 F.2d 1108, 1111 (2d Cir. 1988); *Accord, Gavalik v. Continental Can Co.*, 812 F.2d 834, 851-52 (1987), *cert. denied*, 484 U.S. 979 (1988); *Conkwright v. Westinghouse Electric Corp.*, 933 F.2d 231, 238-39 (4th Cir. 1991); *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1478-79 (5th Cir. 1992); *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1991); *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1120-21 (7th Cir. 1992); *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1089 (8th Cir. 1992); *Kimbro v. Atlantic Richfield, Inc.*, 889 F.2d 869, 881 (9th Cir. 1989); *Woolsey v. Marion Laboratories, Inc.*, 934 F.2d 1452, 1461 (10th Cir. 1991); *Owens v. Storehouse, Inc.*, 984 F.2d 394, 399 (11th Cir. 1993).

A review of these cases reveals that it is a well settled conclusion among the Courts of Appeal that specific intent is required for a violation of Section 1140. This conclusion is supported by the statutory language, and there is no need for this Court to either correct or clarify the law in this area.

III. THE REQUIREMENT OF SPECIFIC INTENT TO VIOLATE THE FIRST CLAUSE OF SECTION 1140 IS SUPPORTED BY THE STATUTORY LANGUAGE AND DECISIONS OF THE COURTS OF APPEAL.

Petitioner's assertion is that the first clause of Section 1140 can be violated without specific intent, by reckless or negligent actions. Borden has argued that this issue is not properly raised since the decisions below correctly considered her claims only under the second clause of Section 1140. Even if properly raised, however, the correct interpretation of the first clause under Section 1140 should be no different than that of the second clause; both require a specific intent.

Petitioner provides no legal authority for her contention. That is because there is none. Her argument would seem to rest upon the conclusion that the statute uses language requiring scienter only in the second clause where the language " . . . or for the purpose . . . " appears. This ignores the fact that the first clause uses "for" in the conjunctive sense to link the prohibited conduct of discharge, discipline, or discrimination to the exercise of a right to which a participant is entitled under the ERISA plan. In this sense, "for" means that the prohibited conduct occurred "because" of the exercise of a right. *The American Heritage Dictionary of the English Language* (1981). Petitioner's argument would seem to suggest that the only requirement be that the conduct cause an interference with the benefits. Clearly, this is not supported either by the above-quoted statutory language or the case law. In *Conkwright v. Westinghouse Electric Corp.*, 933 F.2d 231 (4th Cir. 1991), the Fourth Circuit held that actions by

an employer to save benefit costs were insufficient standing alone to prove intent to discriminate. *Id.* at 239. Likewise, no action lies where the loss of benefits is a mere consequence of termination of employment. *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988). Under petitioner's rationale, any action by an employer which resulted in an adverse effect on a benefit could be actionable. Every participant in a benefit plan would be guaranteed the highest possible benefit, regardless of the motivation behind an employer's actions affecting benefits.

The only two Circuit Courts of Appeal to consider this precise question have explicitly included the first clause of Section 1140 in their holdings requiring specific intent. In *Owens v. Storehouse, Inc.*, 984 F.2d 394, 398 (11th Cir. 1993), the Eleventh Circuit Court of Appeals considered a case where an amendment to a health plan limiting benefits for AIDS was alleged as a violation of Section 1140. The court held Section 1140 does not broadly forbid all forms of discrimination. Rather, it is aimed at discrimination designed as retaliation for exercise of a right or to interfere with attainment of a future right. *Id.* To the same effect are the holdings of the Ninth Circuit in *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 881 (9th Cir. 1989), and *Dytrt v. Mountain State Telephone and Telegraph Company*, 921 F.2d 889, 896 (9th Cir. 1990).

Petitioner's argument, although novel, fits neither within the language of the statute nor its limited purpose. As such, it does not merit the attention of this Court.

IV. THE FOURTH CIRCUIT DID NOT REQUIRE PETITIONER TO PROVE ENTITLEMENT TO A BENEFIT AS AN ESSENTIAL ELEMENT OF HER CLAIM.

Borden agrees with petitioner's assertion that she should not have to show entitlement to benefits as an essential element of her claim for discrimination under Section 1140. The weaknesses with petitioner's argument are that: (1) neither court below required her to establish such an entitlement; and (2) both courts found that she had no evidence tending to prove an illegal motivation on Borden's part.

Petitioner never identifies the precise holding of either court with which she disagrees. Both courts did find that she could not establish her eligibility for long-term disability due to the absence of medical evidence. [Petitioner, App. at 3, 12] The courts below, however, were considering this question because petitioner was maintaining that the fact she was discharged *just before* she completed the six-month waiting period for disability supplied the required causal connection between her discharge and her membership in an ERISA benefit plan:

> Plaintiff argues that she was well on her way to qualifying for long-term disability when she was discharged, and this supplies the necessary causal connection.

[Petition, App. at 10] Since both courts held that her evidence did not tend to prove the waiting period had begun, this evidence could not supply a causal connection. Both courts then proceeded to consider other

evidence which petitioner argued supplied the requisite causal connection.

The linchpin of the decision of both courts was the lack of any evidence to supply the requisite causal connection. The District Court concluded:

> Moreover, even had she presented medical evidence of disability, in order to supply the required causal connection, *she would have to show that defendant was aware of and concerned about her growing eligibility for long-term disability. She has provided no evidence from which this Court could conclude defendant even considered the question of whether she was proceeding toward eligibility.*

[Petition, App. at 13] [Emphasis added]

The Fourth Circuit Court of Appeals concurred:

> While Fleming claimed to have been nearing the twenty-seven week disability threshold required for eligibility for long-term benefits at the time she was terminated, the district court noted that she never actually established, through medical opinion or otherwise, that she was in fact disabled at any time between her injury on January 30, 1986, and her dismissal five months later. *Thus, far from approaching eligibility for long term benefits, Fleming had not even satisfied the prerequisite necessary to start the disability clock running. Moreover, the district court concluded that there was no evidence that the supervisors who hired Fleming had ever even considered the possibility that she might be proceeding toward eligibility for long-term disability benefits at the time they discharged her.*

> . . . [A]greeing that appellant failed to establish her disability through medical opinion during the relevant time period, or to provide any evidence of a causal link . . . we affirm. . . .

[Petition, App. at 3-4] [Emphasis added] Since petitioner has misread the actual holding of the Fourth Circuit, no issue is raised by the petition requiring the attention of the Supreme Court.

V. BORDEN'S ATTENDANCE POLICY IS NOT INHERENTLY DISCRIMINATORY.

Petitioner argues that she raised a genuine issue of material fact concerning direct evidence of discrimination by proof of Borden's attendance policy. Petitioner contends that the policy inherently discriminates against employees with disabilities because it results in termination of employees who exceed the plant average for absences without considering any connection between absences and an employee's disability. Petitioner cites *Gavalik v. Continental Can Company*, 812 F.2d 834 (3rd Cir. 1987) in support of this proposition. The facts concerning the attendance policy are not in dispute. No reasonable inference of discrimination can arise from these facts. Petitioner has presented no evidence that this policy was enacted with a motive to discriminate, such as was shown in the *Gavalik* case. *Id.* at 857.

Absences under the policy due to short-term health or other problems (such as transportation failures) count toward excessive absenteeism. Mechanisms are in place to deal with longer term health problems outside of the attendance policy (medical leaves of absence and/or

short term disability payments). Therefore, it cannot be said that the policy itself is used for screening and eliminating those who might have the potential for qualifying for long-term disability. Nor is there any evidence of arbitrary application of the policy.

The Law Review article cited by petitioner, rather than supporting her argument, recognizes that attendance policies which provide for consideration of long-term absences are not inherently discriminatory:

> Here the employer would argue that the intention is not deprivation of benefits but deterrence of excess absenteeism, a legitimate concern. Yet there are ways of promoting that interest – such as by requiring a doctor's certificate or a physical exam so that the medical condition is genuine – that do not deprive employees of benefits when they need them.

62 Notre Dame Law Review 1024, 1041 (1987).

If petitioner was nearing disability, why didn't she apply for a medical leave? If she was already disabled, why didn't she apply for short-term disability benefits? Such action would have removed her from operation of the attendance policy and saved her job. She had utilized both medical leave and disability in the past; why didn't she this time? The answer is clear – she was not disabled and she could not convince a doctor she should not have been working.

Petitioner's citation to the *Gavalik* case is not applicable. In *Gavalik*, a computer program called the Bell System was designed to identify unfunded pension liabilities and avoid triggering future vesting of these liabilities by

retaining employees whose pensions had vested, while placing on layoff those with unvested pensions. The latter employees were red-flagged to prevent recalls which might trigger additional vesting. *Gavalik*, 812 F.2d at 840-41. There was no other purpose served by the program other than to separate vested and unvested employees and prevent vesting in violation of Section 1140. *Id.* at 857, n. 39.

Here, Borden's attendance policy is designed to identify and correct absenteeism. Attendance is examined over the long run and counseling is plentiful. Employees are given fair opportunity to correct their problems. The methods chosen by Borden give due regard to participants in the disability benefit plan, and no one who is truly disabled need live in fear of discharge, unlike the employees who were near vesting in *Gavalik*. The law is clear that where intent is shown, recovery can be had under Section 510. But there is no evidence of an intent to establish the attendance policy in order to interfere with ERISA benefit rights. The petitioner, far from raising a significant legal issue worthy of consideration by the Supreme Court, merely suffers from a failure of proof.

VI. SECTION 1132 PROVIDES FOR INJUNCTIVE RELIEF WHERE A VIOLATION OF SECTION 1140 IS ESTABLISHED.

Petitioner's argument regarding Section 1132 is confusing. On page 52 of her petition, she claims she was fired before she met respondent's qualifications to file a claim. Therefore, she had no right to benefits under the terms of the plan. Even though she requested recovery of

benefits due her and an order determining her rights under the benefit plan in her complaint, it is clear that the substantive provisions of Section 1132 would provide relief only where a provision of the plan entitled petitioner to such relief. No relief is due for the very reason cited by petitioner: she never met the qualifications under the plan to file a claim. Borden is under no fiduciary duty to evaluate the merits of a claim which is clearly not authorized by the terms of the plan. Even assuming, as petitioner asserts, that this is akin to a contract action, and intent is not relevant, petitioner has never shown a breach of the plan. [Petition at 42]

Section 1132, however, also provides the remedies available for a violation of Section 1140. A full range of legal and equitable remedies, including injunctive relief, is available. This relief, however, was not available to petitioner in this case because she failed to make out a claim under Section 1140. No question of interpretation of Section 1132 is presented for this Court's consideration.

VII. THE DEFINITION OF TOTAL DISABILITY IN THE PLAN WAS NOT MATERIAL TO DECISION IN THIS CASE.

Petitioner argues that the difference between the language used to define "totally disabled" in the actual disability plan documents and the definition appearing in the summary plan description should have prevented the entry of summary judgment in this case. Both courts below recognized the use of different language. Neither court considered it a material fact.

In the actual plan documents, "total disability" for the purposes of this case is defined as inability to perform any and every duty of your occupation. [Jt. App. at 1363] In the summary plan description, the language used says "you are not able to perform the essential duties of your job. . . . " [Jt. App. at 391] Assuming for the purpose of argument that this language is in conflict, it is clear that the courts below did not consider this a material fact because petitioner never presented any evidence of a medical opinion that she met either definition set forth above. There was undisputed testimony that an expert medical opinion was necessary in order to qualify for disability. Lay opinions (such as the petitioner's complaints of pain) were not sufficient. [Jt. App. at 1363-66]

In response to this undisputed fact, the petitioner maintains that there is medical evidence of disability; however, she fails to cite to any evidence of record. Secondly, she states that short-term disability benefits were not available for job-related injuries. While this is true, it has no effect on decision in this case. Workers disabled by on-the-job injuries can qualify for a medical leave of absence (which removes them from operation of the attendance policy), and workers' compensation provides temporary total disability benefits. All this was dependent, however, on a physician certifying that she was unable to work, even at light duty. Unfortunately for petitioner, this never happened.

Petitioner makes two final points. First, that a person could be disabled from performing the essential duties of their job, but still be able to perform certain light duty assignments. In this case, she argues, the waiting period for long-term disability would begin to run even while

the person was still working. While this is an interesting argument, it cannot begin to apply to petitioner until she has evidence showing: (1) what the essential duties of her job were; (2) that she was medically unable to perform these essential functions; and (3) that the light duty she was requested to do did not involve any of the essential functions of her job. Petitioner simply has no such evidence. Finally, petitioner again claims that she was close to qualifying for long-term disability because of her migraines. This has been rebutted earlier in this response and will not be repeated here.

Petitioner's argument is simply a disagreement over her failure to offer sufficient evidence, and raises no important issues under ERISA requiring the attention of this Court.

CONCLUSION

The District Court in this case examined a voluminous record prior to granting summary judgment. The court's well-reasoned opinion correctly identified the essential factual elements which were missing from petitioner's claim. The court correctly applied well-settled legal principles under ERISA in reaching its conclusions. The Court of Appeals reached the same conclusions following its de novo review of the evidence. There is no issue presented by the petition which demands the involvement of the Supreme Court. As such, the petition for writ of certiorari should be denied.

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